Murugayah v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B09–24 OF 1999

AHMAD FAIRUZ CHIEF JUSTICE, RICHARD MALANJUM AND AUGUSTINE PAUL JJCA

15 MARCH 2004

Evidence — Fresh or further evidence — Principles applied — Evidence discovered after conviction — Introduction of — Principles governing introduction of new evidence

The accused was charged in the session court with an offence under s 326 of the Penal Code for having caused grievous hurt to one Kantharupan who at the trial had identified the accused as one of the four persons who had attacked him. The accused was convicted in February 1997 and sentenced. He appealed to the High Court against the conviction and sentence. While the appeal was pending, the accused had made an application to the High Court to adduce additional evidence pursuant to s 317 of the Criminal Procedure Code from himself, Kantharupan and one Krishnan. His application was dismissed by the High Court. Hence this appeal. The basis of his application was that sometime after his conviction, in 1998, he was informed by Krishnan that Kantharupan was actually assaulted by other persons. He later met Kantharupan who told the accused that he had identified the accused in court based on information he obtained from a third party.

Held, allowing the appeal:

(1) The reception of additional evidence is a matter of discretion. It is settled law that the exercise of discretion must be in accordance with established judicial guidelines namely that: (a) the evidence that is sought to call is evidence which was not available at the trial; (b) the evidence is relevant to the issues; (c) the evidence is credible in the sense that it is well capable of belief; (d) there might have been a reasonable doubt in the minds of the jury as to the guilt of the accused if that evidence had been given together with the other evidence of the trial (see para 6).

(2) Not only must the circumstances be most exceptional but the matter which is proposed to be adduced by further evidence must be subject to exceptional conditions. It becomes necessary only if a failure of justice would result if such additional evidence was not taken and allowed when additional facts have come to light since the date of the trial (see para 7).

(3) The facts of the case revealed that the proposed additional evidence was consistent with the answer given by Kantharupan in cross-examination. If the proposed additional evidence is established the explanation offered by Kantharupan in his re-examination as to why he had said that he could not identify the four persons will be wholly demolished. It will be more than enough to raise a reasonable doubt as to the identity of the accused if the evidence had been given at the trial (see para 13).

[**Bahasa Malaysia summary**

Tertuduh dituduh di mahkamah sesyen kerana kesalahan di bawah s 326 Kanun Keseksaan yang menyebabkan kecederaan teruk ke atas Kantharupan yang semasa perbicaraan telah mengenalpasti tertuduh sebagai salah seorang daripada orang yang telah menyerangnya. Tertuduh telah disabitkan pada bulan Februari 1997 dan dijatuhkan hukuman. Beliau telah merayu ke Mahkamah Tinggi terhadap sabitan dan hukuman. Sementara menunggu rayuan, tertuduh telah membuat satu permohonan untuk mengemukakan satu permohonan ke Mahkamah Tinggi untuk mengemukakan keterangan tambahan menurut s 317 Kanun Acara Jenayah daripada beliau sendiri, Kantharupan dan seorang bernama Krishnan. Permohonan beliau telah ditolak oleh Mahkamah Tinggi. Justeru itu, rayuan ini dibuat. Asas permohonan beliau adalah bahawa selepas sabitan beliau, pada tahun 1998, beliau telah dimaklumkan oleh Krishnan bahawa Kantharupan sebenarnya telah diserang oleh orang lain. Beliau kemudian menemui Kantharupan yang memberitahu tertuduh bahawa beliau telah mengenalpasti tertuduh di mahkamah berdasarkan maklumat yang diterima daripada pihak ketiga.

Diputuskan, membenarkan rayuan tersebut:

(1) Penerimaan keterangan tambahan adalah satu perkara budi bicara. Ia adalah undang-undang tetap bahawa penggunaan budi bicara mestilah menurut panduan-panduan kehakiman tetap iaitu bahawa: (a) keterangan yang dipohon untuk diterima adalah keterangan yang tidak ada semasa perbicaraan; (b) keterangan tersebut adalah relevan kepada persoalan-persoalan; (c) keterangan tersebut boleh dipercayai di mana ia boleh dipercayai; (d) mungkin terdapat keraguan munasabah dalam pemikiran juri berhubung kebersalahan tertuduh jika keterangan tersebut diberikan bersama dengan keterangan lain dalam perbicaraan tersebut (lihat perenggan 6).

(2) Bukan sahaja keadaan tersebut suatu yang luar biasa tetapi perkara yang dicadangkan untuk dikemukakan dengan keterangan lain perlulah tertakluk kepada keadaan luar biasa. Ia hanya perlu jika berlaku kegagalan keadilan jika keterangan tambahan tidak diambil dan dibenarkan sedangkan keterangan fakta tersebut telah disebut-sebut sejak tarikh perbicaraan lagi (lihat perenggan 7).

(3) Fakta-fakta kes mendedahkan bahawa keterangan tambahan yang dicadangkan adalah konsisten dengan jawapan yang diberikan oleh Kantharupan dalam pemeriksaan balas. Jika keterangan tambahan yang dicadangkan tersebut dibuktikan dengan penjelasan yang diberikan oleh Kantharupan dalam pemeriksaan semula beliau berhubung kenapa beliau telah menyatakan bahawa beliau tidak dapat mengenalpasti empat orang akan dihapuskan keseluruhan. Ia lebih daripada mencukupi untuk menimbulkan satu keraguan munasabah berhubung identiti tertuduh jika keterangan telah diberikan semasa perbicaraan (lihat perenggan 13).]

Notes

For cases on principles applied in fresh or further evidence, see 7(2) *Mallal's Digest (*(4th Ed, 2003 Reissue) para 1511.

Cases referred to

Che Din bin Ahmad v PP [1976] 1 MLJ 289 (refd)
Dol bin Lasim v PP [1987] 1 MLJ 116 (refd)
Jum'at bin Samad v PP [1993] 3 SLR 338 (refd)
Khamis v PP [1971] 2 MLJ 267 (refd)
Ladd v Marshal [1954] 3 All ER 745 (refd)
Lo Fat Thjan & Ors v PP [1968] 1 MLJ 274 (refd)
Mohamed bin Jamal v PP [1964] 1 MLJ 254 (refd)
R v Jordan (1956) 40 Cr App R 152 (refd)
R v Parks [1961] 3 All ER 633 (refd)
Wollongong Corporation v Cowan (1955) 93 CLR 435 (refd)

Legislation referred to

Criminal Procedure Code s 317
Penal Code ss 193, 326

Appeal from: Criminal Appeal No 42–6 of 1997 (High Court, Shah Alam)

Mohamed Haniff bin Khatri Abdulla (Haniff & Rajendran) for the appellant.
Azhar bin Abdul Hamid (Attorney General's Chambers) for the respondent.

Augustine Paul JCA (delivering judgment of the court):

[1] The accused was charged with an offence under s 326 of the Penal Code in the Sessions Court at Shah Alam for having caused grievous hurt to one Kantharupan on 20 November 1993 at a bus stand in Klang. During the trial, Kantharupan identified the accused as one of the four persons who had attacked him. He said that the accused was known to him prior to the incident. On 22 February 1997, the accused was found guilty and convicted. He was sentenced to five years imprisonment and ordered to be given three strokes of the rotan. He appealed to the High Court against the conviction and sentence.

[2] While the appeal was pending, the accused made an application to the High Court to adduce additional evidence pursuant to s 317 of the Criminal Procedure Code from he himself, Kantharupan and one Krisnan. In the affidavit filed in support of the application, he affirmed that in May 1998 he was informed by Krisnan that based on information he has Kantharupan was assaulted by four other persons one of whom is named Sugumaran. Sometime later, he met Kantharupan at the Klang Medical Centre. As he said in para 10 of his affidavit:

> Saya telah bertanya akan Kantharupan tersebut, dalam bahasa Tamil berhubung keterangan beliau di Mahkamah semasa perbicaraan bahawa saya adalah salah orang yang menyerang beliau. Semasa penyoalan dibuat oleh saya kepada beliau, beliau telah memberitahu saya beliau telah memberi keterangan sedemikian kerana mendiang Dato TM Thurai yang telah memberitahunya bahawa saya adalah orang yang memukulnya.

[3] He further affirmed that despite his requests Kantharupan has refused to tell the truth in court even though he knew that it was not the accused who had assaulted him. He then said in para 16 of his affidavit:

Saya sesungguhnya percaya bahawa jika Mahkamah Yang Mulia ini memberi peluang kepada saya untuk membuktikan keterangan ini di Mahkamah dan memanggil semula Kantharupan tersebut, bagi tujuan soal-balas oleh peguam saya, Mahkamah Yang Mulia ini boleh menilai samada keterangan Kantharupan tersebut di Mahkamah Sesyen terdahulu, benar atau tidak.

[4] The application was dismissed by the High Court. As the learned judge said in pp 5–6 of his grounds of judgment:

Setelah membaca affidavit sokongan pemohon dan mendengar hujah kedua-dua pihak, saya berpendapat bahawa:

(i) keterangan baru melalui perayu dan SP2 adalah keterangan yang tidak boleh didapati pada masa perbicaraan di Mahkamah Sesyen; dan

(ii) keterangan baru yang dicadangkan adalah relevan dengan pertuduhan terhadap perayu dan isu mengenai identiti orang yang mencederakan SP2.

Oleh itu ia telah memenuhi prinsip pertama dan kedua yang dirujuk di dalam *RvParks*. Mengenai prinsip ketiga, saya berpendapat bahawa keterangan SP2 adalah berkebolehan untuk dipercayai, jika ia bersetuju memberikan keterangan semula dengan mengatakan bahawa keterangannya dahulu adalah tidak benar dan sanggup berhadapan dengan kemungkinan dirinya dituduh di bawah seksyen 193 Kanun Kesiksaan kerana memberikan keterangan palsu. Malangnya perayu sendiri di dalam afidavit sokongannya menyatakan bahawa SP2 enggan memenuhi permintaannya. SP2 juga tidak ada memfailkan affidavit bagi menyokong permohonan perayu. Dalam keterangan sedemikian, perayu tidak dapat memenuhi prinsip ketiga.

Prinsip keempat tidak mungkin dapat dipatuhi oleh perayu memandangkan SP2 enggan bekerjasama dengan perayu. SP2 juga tidak ada memfailkan affidavit bagi menyatakan bahawa ia akan datang dengan sukarela untuk memberi keterangan semula di Mahkamah. Keterangan baru dari perayu sendiri, tanpa disokong oleh SP2, akan merupakan keterangan dengar cakap sahaja. Di samping itu, keterangan daripada perayu sahaja, tanpa keterangan baru daripada SP2, adalah tidak lebih daripada ulangtayang ceritanya yang dahulu di mana ia akan sekali lagi menafikan pertuduhan terhadapnya.

[5] Section 317 of the Criminal Procedure Code, which deals with the reception of additional evidence, reads as follows:

(1) In dealing with any appeal under this Chapter a Judge, if he thinks additional evidence to be necessary, may either take such evidence himself or direct it to be taken by a Magistrate.

(2) When the additional evidence is taken by a Magistrate he shall certify that evidence to the High Court who shall then, as soon as may be, proceed to dispose of the appeal.

(3) Unless the Judge otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.

(4) The taking of evidence under this s shall, for the purposes of Chapter XXV, be deemed to be an inquiry.

[6] It will be observed that the reception of additional evidence is a matter of discretion. It is settled law that the exercise of a discretion must be in accordance with established judicial guidelines. In the case of adducing additional evidence, the guidelines were spelt out in *Ladd v Marshal* [1954] 3 All ER 745 in the form of three conditions. In elaboration of the conditions, Lord Parker CJ said in *R v Parks* [1961] 3 All ER 633 at p 634:

Those principles can be summarized in this way. First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

[7] The statement of the law in *R v Parks* [1961] 3 All ER 633 has been adopted and applied in local cases such as *Mohamed bin Jamal v Public Prosecutor* [1964] 1 MLJ 254; *Dol bin Lasim v Public Prosecutor* [1987] 1 MLJ 116; *Lo Fat Thjan & Ors v Public Prosecutor* [1968] 1 MLJ 274 and *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289. The conditions are cumulative and not in the alternative and it is for the appellant to satisfy the court that they have been fulfilled (see *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289). It is only in the most exceptional circumstances that the court will receive additional evidence. As Syed Agil Barakbah J (as he then was) said in *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 at pp 289–290:

Now, s 317 of the Criminal Procedure Code gives a discretion to the judge in hearing any appeal to allow additional evidence if he thinks such is necessary. In considering such application the appellate court has always adopted the attitude that it is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the court is ever willing to listen to additional evidence (*Mohamed bin Jamal v Public Prosecutor* [1964] 1 MLJ 254, 255 per Thomson LP, quoting Hallet J in the case of *R v Jordan* (1956) 40 Cr App R 152, 154). It is clear, therefore, that not only the circumstances must be most exceptional but the subject which is proposed to be adduced by further evidence is subject to exceptional conditions. It becomes necessary only if a failure of justice would result if such additional evidence was not taken and allowed when additional facts have come to light since the date of trial. The matter is left entirely to the discretion of the court.

[8] It was held in *Khamis v Public Prosecutor* [1971] 2 MLJ 267 that the necessity for additional evidence should be apparent from the record itself and should not be sought from outside information, that is, there should be some prima facie evidence bearing upon the guilt or innocence of the accused to be found on the record itself. In disagreeing with this view, Yong Pung How CJ said in *Jum'at bin Samad v Public Prosecutor* [1993] 3 SLR 338 at p 344:

It is not inconceivable that there could be a situation where wholly unexpected evidence would be unearthed after the trial which brings into contention a new aspect which was not addressed at all in the trial.

[9] We are also of the same view. However, we must add that where the additional evidence sought to be adduced is apparent from the record itself it may be resorted to in support of the application. It may also militate against a submission that the proposed evidence is a fabrication.

[10] In considering the application, the learned judge held that the first two conditions enunciated in *R v Parks* [1961] 3 All ER 633 had been fulfilled, that is to say, the proposed evidence could not have been obtained at the

time of the trial and that it was relevant to the issue of identity of the person who had injured Kantharupan. We agree with these findings. However, his Lordship was of the view that the third and fourth conditions have not been fulfilled as the accused's affidavit has revealed that Kantharupan has refused to testify in court; that Kantharupan has not affirmed an affidavit to state that he will be attending court voluntarily to testify; and that the proposed evidence of the accused without being supported by the testimony of Kantharupan will be hearsay. The first observation to be made is that even though it is desirable for there to be an affidavit of the proposed evidence it is not necessary in every instance when additional evidence is to be called as it may not be possible to file an affidavit in certain cases. However, what is essential is that the affidavit that has been filed in support of the application must state exactly what witness would be called, exactly what that witness would be prepared to say or prove, or of what inquiries had been made before the trial, or what subsequent inquiries had resulted in the disclosure of the evidence (see *Wollongong Corporation v Cowan* (1955) 93 CLR 435). On the facts of this case the absence of an affidavit from Kantharupan is understandable in view of his reluctance to attend court. It is therefore not fatal. The ruling that the proposed evidence of the accused is hearsay without being supported by the testimony of Kantharupan is pre-mature. It must be remembered that the accused is applying for leave to call Kantharupan as a witness precisely for the very purpose of proving the statement. A ruling as to whether the evidence is hearsay or not or is to be believed or not can only be made after attempts have been made for Kantharupan to testify, and upon a consideration of his testimony if he testifies, and not at this stage. As clearly explained in the third condition enunciated in *R v Parks* [1961] 2 All ER 633, it is not the task of the court to decide whether the proposed evidence is to be believed or not. At this stage, the function of the court is only to determine whether the proposed evidence, if given, is capable of belief. The proposed evidence assumes significance in view of the testimony of Kantharupan elicited during his cross examination. As he said, in answer to questions:

> Benar, saya ada beritahu doktor saya dipukul oleh 4 lelaki India. Saya beritahu apabila ditanya oleh doktor pada hari itu. Benar pada hari itu saya beritahu doktor saya diserang oleh 4 lelaki India yang tak dikenali.

[11] And further on:

> Benar, saya katakan kepada orang yang melawat saya, bahawa saya tak tahu siapa yang menyerang saya. Kali pertama saya beritahu polis salah seorang yang menyerang saya ialah OKT. Dua atau tiga hari selepas saya keluar hospital.

[12] In re-examination, he said:

> Saya beritahu doktor saya diserang oleh 4 lelaki India yang tak dikenali. Ketika itu kawan dan keluarga saya ada disitu, saya tak beritahu nama OKT sebagai orang yang menyerang saya kerana saya tak mahu keluarga saya takut atau balas dendam.

[13] It must be observed that the accused had also visited Kantharupan in the hospital. The proposed additional evidence is consistent with the answer given by Kantharupan in cross examination and is therefore capable of belief. This will establish the third condition prescribed in *R v Parks* [1961] 3 All

ER 633. If the proposed additional evidence is established the explanation offered by Kantharupan in his re-examination as to why he had said that he could not identify the four persons will be wholly demolished. It will be more than enough to raise a reasonable doubt as to the identity of the accused if the evidence had been given at the trial thereby satisfying the requirement of the fourth condition.

[14] In the circumstances, we were satisfied that the required four conditions had been established. In the upshot, we allowed the appeal.

Appeal allowed.

Reported by Mariette Peters-Goh